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No. ~~07-4404~~

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In the Supreme Court of the United States

Elizabeth Rask,

Petitioner,

v.

Fresenius Medical Care North America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Petitioner's Statement of the Questions Presented rests on factual inaccuracies and false premises. Respondent submits the following Counter Statement of Questions Presented.

1. Whether the Eighth Circuit Court of Appeals applied well-settled law in determining that Respondent had no duty to accommodate Petitioner's alleged disability because Petitioner failed both to provide sufficient notice of purported limitations resulting from her alleged disability and also failed to make a request for a reasonable accommodation.

2. Whether the Eighth Circuit Court of Appeals applied well-settled law in determining that Petitioner failed to avail herself of the protections of the FMLA because Petitioner failed both to request and to give adequate notice of her alleged need for leave because of a serious health condition.

PARTIES

1. Petitioner Elizabeth Rask ("Rask" or "Petitioner") is a former patient care technician of Bio-Medical Applications of Minnesota, Inc., d/b/a FMC Dialysis Services Duluth (erroneously identified by Petitioner as "Fresenius Medical Care North America" and herein referred to as "BMA" or "Respondent").

2. BMA operates a network of dialysis clinics located in Minnesota and Western Wisconsin. BMA is an "employer" as that term is defined in the ADA and FMLA. BMA's parent company is Bio-Medical Applications Management Company, Inc., which owns 100% of BMA's stock. There is no publicly held corporation that owns 10% or more of BMA's stock.

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OPINIONS BELOW

The Judgment Order of the Court of Appeals affirming the District Court's grant of summary judgment to BMA on all of Rask's claims is attached as Appendix A to the Petition and is reported as *Rask v. Fresenius Med. Care N.A.*, 509 F.3d 466 (8th Cir. 2007). The Court of Appeals' Order denying Rask's Petition for Panel Rehearing and for en banc Rehearing is not officially reported. The District Court Order granting summary judgment to BMA is attached as Appendix B to the Petition and is not officially reported. (Hereinafter, references to Appendix Exhibits to the Petition are cited as "App. [A/B], p. __.")

STATEMENT OF THE CASE

Rask's Statement of the Case contains numerous inaccuracies. The following Statement of the Case accurately reflects the record.

I. RASK'S EMPLOYMENT AND ACKNOWLEDGMENT OF BMA'S POLICIES.

Rask was hired as a regular patient care technician in BMA's dialysis clinic in Duluth, Minnesota on April 15, 2001. (App. B, pp. 29-31.) In this position, Rask was responsible for delivering safe and effective care to dialysis patients suffering from end-stage renal disease. (App. A, p. 16; App. B, p. 56.)

Rask acknowledged that she received a copy of BMA's FMLA policy, which was contained in the Employee Handbook, and that she had regular access to BMA's Human Resources Policy Manual, which contained the FMLA policy as well as BMA's EEO policy and BMA's progressive and cumulative disciplinary program. (App. B, p. 32.)

II. RASK PROGRESSES THROUGH BMA'S DISCIPLINARY PROGRAM AND IS DISCHARGED.

A. Rask's Performance Problems.

Rask was repeatedly counseled and disciplined from December 2002 through October 2003 for performance and attendance-related policy infractions such as being verbally abusive toward coworkers, making routine complaints and other inappropriate statements in the presence of patients, ignoring patient needs and refusing to help staff, using foul language, disrespecting her supervisor, and incurring excessive unscheduled absences. (App. B, pp. 32-36.) Rask progressed through BMA's cumulative disciplinary policy and was suspended in March 2004 for making negative remarks about her supervisor, BMA, her unit, and her coworkers. (App. B, p. 36.)

After her suspension, and at a time when she knew the next step in the progressive disciplinary process was termination, Rask incurred further discipline by violating BMA's attendance policy three more times in March and May 2004. (App. B, pp. 36-38.) Following these infractions, Rask was

terminated in June 2004 for exceeding the maximum allowable number of corrective actions under BMA's policies.[1] (App. B, p. 40.)

B. Rask Provided No Notice to BMA During Her Employment that Her Absences, which Formed only a Partial Basis for Her Termination, were Due to Depression, and She Never Requested FMLA Leave.

Almost two weeks after her discharge, Rask for the first time provided BMA with a doctor's note stating that she had depression. (App. B, p. 39.) During her employment, Rask never submitted doctor's notes for any of her absences that resulted in corrective action, and she did not mention in any of her numerous corrective action meetings with supervisors that she had a mental health condition that required medication or that she was seeing a psychiatrist or psychologist. (*Id.*) The only information Rask presented to BMA in connection with any of her absences took place after her suspension, when she informed her supervisor that

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[1] Rask's assertions that (1) she was told that she was terminated because of her attendance on three occasions, and (2) "[her] employment was terminated for attendance," are flatly contradicted by the record evidence that establishes Rask was terminated for progressing through BMA's cumulative discipline program for a host of policy violations. (Petition, pp. 4-5.) Rask's curious assertion that she "worked successfully for [Respondent] for six years before her employment was terminated" is also in stark contrast to the record. (Petition, pp. 4-5.)

she was "not feeling right" and was having unidentified "side effects" from some unidentified medication she claimed to have been taking. (App. B, pp. 36-37, 39-40.)

Notwithstanding the fact that Rask was aware of, and had access to, BMA's policies and postings concerning EEO, FMLA, and ADA, she never discussed or requested FMLA leave. (App. B, p. 39.) Nor did Rask ever initiate any interactive dialogue regarding her health or request any accommodation in the form of extended sick leave. (App. A, pp. 19-20.) When BMA asked Rask in one of her many corrective action meetings whether there was "anything that [BMA] could do for her, was there anything wrong" Rask simply stated that she was sick on one of the days she was absent, and then resorted to criticizing BMA and its employees, stating that she was underappreciated and that BMA was a "terrible place to work." (App. B, pp. 35, 37.) Rask did not offer specific facts of a single discussion in which she advised her supervisors that she had been diagnosed with depression, that the medication she was taking was to treat depression, or that her absences were in any way causally related to depression.[2]

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[2] Rask's assertion that she "told her supervisor and her supervisor's manager of her depression and her requiring medication for its treatment" is simply not supported by the record. (Petition, p. 5.)

III. RASK FILES A LAWSUIT ALLEGING DISABILITY DISCRIMINATION AND FMLA INTERFERENCE, WHICH THE DISTRICT COURT DISMISSES ON SUMMARY JUDGMENT.

A. Rask's Claims.

Rask filed a complaint against BMA in the United States District Court, District of Minnesota, on June 28, 2005, alleging that her termination violated the Family Medical Leave Act, the Americans With Disabilities Act, and the Minnesota Human Rights Act. Rask also claimed that BMA violated the ADA and the MHRA by failing to provide her a reasonable accommodation for her disability.

B. The District Court Dismisses of all of Rask's Claims.

On October 26, 2006, the District Court granted BMA's motion for summary judgment and dismissed all of Rask's claims. (App. B.) The District Court found that Rask failed to establish a genuine issue of material fact with respect to her ADA claims of disability discrimination and failure to accommodate. Specifically, the District Court concluded that Rask failed to establish that she had a disability because the evidence did not demonstrate a substantial limitation in the major life activities of thinking, concentrating, sleeping, or working.

The District Court also concluded that Rask was not "otherwise qualified" under the ADA, with or without a reasonable accommodation, as Rask failed

to meet BMA's expectation that she avoid accumulating unscheduled absences and avoid conducting herself inappropriately toward patients, staff, and supervisors. Further, because Rask offered no notice of her mental health condition or need for time off because of it, BMA had no knowledge of Rask's alleged depression and no duty to provide a reasonable accommodation. The District Court also found that BMA identified a legitimate, non-discriminatory reason for Rask's discharge – she progressed through BMA's cumulative disciplinary program.

With respect to Rask's FMLA interference claim, the District Court concluded that Rask's vague comments about her medication and being sick were insufficient to notify BMA that she had a serious health condition or sought leave for such a condition. As such, Rask was not entitled to the protections of the FMLA. The District Court entered judgment on October 27, 2007.

IV. RASK APPEALS TO THE EIGHTH CIRCUIT, WHICH AFFIRMS THE DISTRICT COURT JUDGMENT.

Rask filed a Notice of Appeal from the District Court's Judgment on November 21, 2006. The Eighth Circuit Court of Appeals affirmed judgment on December 6, 2007.

The Court of Appeals declined to decide whether Rask was disabled because, regardless of the evidence relating to that element of her ADA claim, Rask failed to show she was otherwise qualified to

perform an essential function of her job – reliably and consistently showing up for work. Furthermore, BMA had no duty to accommodate Rask because Rask failed as a matter of law to provide sufficient notice of the limitations resulting from her alleged disability. Finally, the Court of Appeals held that, even assuming BMA was properly notified, Rask's requested accommodation to allow her to take sudden, unscheduled absences was unreasonable as a matter of law given the specific circumstances of her employment.

The Court of Appeals also affirmed judgment as to Rask's FMLA claim. The Court of Appeals held that, as a matter of law, Rask failed to give proper notice of her request to take FMLA leave for a serious health condition. Vague, out-of-context references to medication and even use of the word "depression," the Court of Appeals concluded, did not trigger a duty on BMA's part to provide Rask with leave.

Rask filed a petition for panel and en banc rehearing of the Court of Appeals' decision on December 19, 2007, alleging that her claims presented special and unique facts. On January 18, 2008, the Court of Appeals denied Rask's Petition for rehearing.

V. RASK FILES A PETITION FOR WRIT OF *CERTIORARI*.

Rask filed a Petition for Writ of *Certiorari* in this Honorable Court on April 15, 2008. The Petition was docketed on April 18, 2008.

REASONS FOR DENYING THE PETITION

I. THE CRITERIA OF SUPREME COURT RULE 10 ARE NOT SATISFIED.

This Court has complete discretion to determine whether to grant a petition for *certiorari*, and a petition will be granted only for compelling reasons. (Sup. Ct. R. 10.) Generally, a petitioner must be able to demonstrate that: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Sup. Ct. R. 10.)

None of the above considerations exists in this case. Rather, the Court of Appeals applied appropriate, well-reasoned, and established legal standards for evaluating ADA and FMLA claims to the record evidence in concluding that Rask's claims lacked merit as a matter of law. Accordingly, and for the reasons set forth below, the Petition should be denied in its entirety.

II. THE COURT OF APPEALS DETERMINATION THAT BMA HAD NO DUTY TO ACCOMMODATE RASK'S ALLEGED DISABILITY IS NOT WORTHY OF SUPREME COURT REVIEW.

A. The Court of Appeals Applied Well-Settled Law in Determining that Rask Failed to Provide Notice to BMA of Her Limitations.

1. The Standard for Employee Notice is Well-Established and Well-Informed.

The Eighth Circuit consistently holds that:

> [w]here the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, *the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.*"

See, e.g., Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 689 (8th Cir. 1998) (italics in original, underlined emphasis added), *cert. denied,* 526 U.S. 1004 (1999); *see also Toyota Motor Mfg., Ky. v. Williams,* 534 U.S. 184, 193 (2002) (the ADA requires employers to provide accommodations to the known physical or mental limitations of an otherwise

qualified individual with a disability unless such covered entity can demonstrate that the accommodation would impose an undue hardship); *Miller v. National Cas. Co.*, 61 F.3d 627, 629 (8th Cir. 2005) (citing 29 C.F.R. App. § 1630.9) (to prove discrimination, an employee must show that the employer knew, or should have known, of the employee's substantial physical or mental limitation).

If the employee fails to meet her burden to identify her disability, specifically identify her resulting limitations, and suggest a reasonable accommodation, summary judgment is appropriate on the employee's failure to accommodate claim because the employer's duty to accommodate is not triggered. *See, e.g., Russell v. TG Mo. Corp.*, 340 F.3d 735, 742 (8th Cir. 2003) (absent evidence that employee told her manager that the reason she needed to leave work was because of bipolar disorder, termination of employee for attendance infractions was insufficient to support claim for failure to accommodate); *Wallin*, 153 F.3d at 689 (affirming summary judgment to employer where employee requested transfers but made no connection between these requests and his disabilities).

The above decisions, and others from the Eighth and other circuits, recognize the clear distinction that exists between an employer's knowledge of a condition and the employer's knowledge of the limitations experienced as the result of the condition. The requirement that an employee provide her employer with knowledge of both is, therefore, entirely justified. *See Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th

Cir. 1996), *cert. denied*, 519 U.S. 1029 (1996) (the ADA requires employers to reasonably accommodate limitations associated with a disability, not the disability itself); *see also* 42 U.S.C. §§ 12102(2)(A)-(C) (defining "disability" to include a physical or mental impairment that substantially limits one or more of the major life activities of such individual) (emphasis added).

2. The Court of Appeals Correctly Applied the Established Standard for Employee Notice.

The Court of Appeals correctly concluded that the standard in *Wallin* applied in this case. Rask's alleged disability, resulting limitations, and necessary reasonable accommodations were not open, obvious, and apparent. Rask never submitted any written documentation about her alleged depression, treatment, or medication to BMA at any time during her employment. Nor did Rask offer specific evidence of a single discussion in which she advised her supervisors that she had depression that was causally related to her absences. Accordingly, Rask had a duty to specifically identify the disability and resulting limitations and to suggest reasonable accommodations in order to trigger BMA's duty to accommodate her limitations.

The Court of Appeals also correctly concluded that Rask failed to meet her burden in both respects. The record is completely devoid of Rask providing BMA with any information relating to her absences other than vague references to medication, "not feeling right," and being sick. Despite the many

conversations that Rask's supervisors had with her about attendance and performance, Rask never specifically identified any limitations she was experiencing. *Taylor*, 93 F.3d at 165 (holding that an employee had not given sufficient notice to trigger his employer's duty to engage in the interactive process because, although the employee mentioned to his employer that he was diagnosed with bipolar disorder, nothing the employee had done suggested the nature of his illness). The Court of Appeals' conclusion that Rask's conduct did not to trigger BMA's duty to engage in the interactive process with her was the result of a straightforward application of established law.

3. The Court of Appeal's Decision does Not Conflict with EEOC Enforcement Guidance.

Rask argues that the Court of Appeals' holding on Rask's insufficient notice runs contrary to EEOC enforcement guidance. (Petition, pp. 12-13.) EEOC guidance relating to the ADA is just that, and a conflict between a court of appeals decision and EEOC guidance does not entitle a petitioner to a review of her case by this Court. Regardless, no such conflict exists in this case.

The EEOC guidance cited by Rask relates only to whether an employee has requested an accommodation, not whether an employee has identified her limitations. The act of requesting an accommodation, however, does not independently satisfy an employee's other obligations under the

ADA to specifically identify the disability and the resulting limitations when they are not open, obvious, and apparent. *Wallin*, 153 F.3d at 689. The EEOC commentary relating to a request for accommodation is therefore inapplicable to the question presented here.

B. The Court of Appeals' Applied Well-Settled Law in Holding that Rask Failed to Request a Reasonable Accommodation.

1. There is a Well-Established Standard for Analyzing Whether a Requested Accommodation is Reasonable on a Case-by-Case Basis.

Congress and the Department of Labor have made clear that the reasonableness of a requested accommodation depends on the circumstances of the case in question. *See* 42 U.S.C. § 12112(b)(5)(A)(9) (the term "reasonable accommodation" may include job restructuring, part-time or modified work schedules, and other similar accommodations for individuals with disabilities); 29 C.F.R. § 1630.2 (same). This Court has also deemed individualized attention to disability claims "essential." *See School Bd. v. Arline*, 480 U.S. 273, 287 (1987). As such, the question of whether an accommodation is reasonable requires a case-by-case analysis. *See, e.g., Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2d Cir. 1999); *Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998).

Notwithstanding the individualized inquiry, courts widely recognize that an the ADA does not require an employer to eliminate or reallocate essential job functions to accommodate a disabled employee, and requests for such accommodations are widely regarded as unreasonable as a matter of law. *See, e.g., Dvorak v. Mostardi Platt Assocs.*, 289 F.3d 479, 484-85 (7th Cir. 2002); *Martin v. Kansas*, 190 F.3d 1120, 1133 (10th Cir. 2001); *Phelps v. Optima Health, Inc.*, 251 F.3d 21, 26 (1st Cir. 2001); *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991). The Third Circuit has espoused this same principle with specific reference to 29 C.F.R. § 1630.2(o)(1)(ii) in finding that a "blanket requirement" that an employer provide additional leave for depression is beyond the scope of the ADA when the absent employee "simply will not be performing the essential functions of her position." *Walton v. Mental Health Assoc. of S.E. Penn.*, 168 F.3d 661, 669 (3d Cir. 1999) (quoting the Federal Regulations, which provide:

> the obligation to make reasonable accommodation . . . does not extend to the provision of adjustments or modifications that are primarily for the personal benefit of the individual with a disability. Thus, if an adjustment or modification is job-related, e.g., specifically assist the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation. On the other hand, if an adjustment or modification assists the individual throughout his or her daily activities, on

> and off the job, it will be considered a personal item that the employer is not required to provide.

29 C.F.R. §§1630.2(o)(ii), (iii)).

Regardless of their precise wording, all of these cases, like the Eighth Circuit opinion in this matter, support the proposition that an accommodation is reasonable only if it enables the employee to perform the essential functions of the job.

2. The Court of Appeals Correctly Applied the Standard for Analyzing Requests for Accommodation in this Case.

A cursory reading of the Court of Appeals' decision makes clear that it analyzed Rask's request under the specific facts and circumstances of Rask's employment. The only evidence in the record that could potentially be deemed a request by Rask for accommodation is her statement to her supervisors that "I might miss a day here and there because of [my medication]." (App. A, p. 26.) As the Court of Appeals noted, Rask's requested accommodation amounted to a request for permission to take "sudden," "unscheduled," and "unanticipated" absences at a time when BMA had already decreased Rask's schedule to two days of work per week at Rask's request. (App. A, pp. 19-20.)

In analyzing the reasonableness of Rask's request, the Court of Appeals noted the following circumstances relating to Rask's employment: (1) Rask made no showing that BMA would be able to

staff its operations on short notice at times when it expected Rask to be at work; (2) Rask did not have the kind of job that could be performed from another site or put off until another time, as she cared for seriously ill patients in need of dialysis; (3) Rask had already been permitted to modify the number of hours that she worked; and (4) at the time of her termination, Rask was working only two days a week and already had substantial time away from work and could take more (scheduled time away from work) if she needed it. (App. A, pp. 17, 19-20.) Based on these facts, and because, under these circumstances, the ability to take sudden, unscheduled absences would have been for Rask's personal benefit rather than to assist her in performing the duties of her job, the Court of Appeals held that permitting Rask to take "sudden," "unscheduled," and "unanticipated" absences "cannot as a matter of law be a reasonable accommodation given the circumstances of Ms. Rask's employment." (App. B, pp. 19-20) (emphasis added). The Court of Appeals' holding does not create a bright line rule. It is the product of a quintessential fact-specific analysis, consistent with well-recognized and universal authority.

3. Rask is Simply Wrong in Asserting that the Court of Appeals' Decision Runs Contrary to Other Authority.

Rask, who never requested a reasonable accommodation during her employment, baldly alleges the following three arguments in support of

her Petition as it relates to whether her after-the-fact proposed accommodation was reasonable: (1) the Court of Appeals created a "rule that a request by a disabled person for time off on short notice is an unreasonable accommodation not required to be provided by the ADA"; (2) the Court of Appeals' holding that Rask's requested accommodation was unreasonable as a matter of law runs contrary to precedent; and (3) the Court of Appeals misinterpreted 29 C.F.R. §§1630.2(o)(ii), (iii). (Petition, p. 10.) Rask misreads both the Court of Appeals' decision and the authority she cites in support of her contentions.

It is obvious that the Court of Appeals did not establish any bright line rule relating to reasonable accommodations. Instead, the Court of Appeals engaged in a fact-specific analysis and determined that Rask did not request an accommodation that was reasonable under the circumstances of her employment. There is no merit to Rask's unsubstantiated assertion that a "rule" was created in this case.

Second, Rask misreads all the authority she cites in an effort to support her argument that the Court of Appeals' decision runs contrary to the decisions of other Circuits and the EEOC interpretive guidance regarding the allowance of time away from work as a reasonable accommodation. Contrary to Rask's parenthetical relating to *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996), that case does not stand for the proposition that "'paid sick leave, paid personal days, a voluntary time off program, and ample and flexible vacation time' constitute

reasonable accommodation." (Petition, p. 11.) *Hankins* stands for nothing more than that such accommodations are "potential" forms of reasonable accommodation.[3] *Hankins*, 84 F.3d at 801. Furthermore, both *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996),[4] and the EEOC's Interpretive Guidance, 29 C.F.R. Part 1630, app. 1630, discuss reasonable accommodations in potential, permissive language, reaffirming the case-by-case nature of reasonable accommodation analysis. (Petition, p. 11.)[5]

Finally, Rask takes issue with the Court of Appeals' conclusion that, under the circumstances of her employment, sudden, unscheduled absences would have been primarily for Rask's personal benefit. (App. A, p. 20.) In support of the contention that the Court of Appeals misinterpreted the Federal Regulations, Rask asserts that 29 C.F.R.

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[3] Notably, the Tenth Circuit in *Hudson* held, as a matter of law, that the employee's request of unpaid leave in that case was unreasonable.

[4] Notably, the Sixth Circuit in *Hankins* affirmed summary judgment to the employer-appellee.

[5] Rask misleadingly quotes language from *Dark v. Curry County*, 451 F.3d 1078, 1090 (9th Cir. 2006); that "there remains a genuine issue of material fact as to whether Dark could reasonably have been accommodated by his request for leave sufficient to permit his transition to new medication." (Petition, p. 11.) First, there is no evidence in the record that Rask ever requested leave as a reasonable accommodation during her employment. Any case analyzing facts under which an employee made such a request is thus wholly inapplicable. Regardless, in the sentence preceding the language Rask quotes, the Ninth Circuit in *Dark* specifically recognized that its holding was based on the "specific circumstances of [plaintiff's] case."

§§1630.2(o)(ii), (iii) "is only negating the suggestion that an employer must provide certain tangible physical items as a reasonable accommodation." (Petition, p. 12) (emphasis added). Rask cites no authority for such a limited reading of the Regulation, and there is simply no basis – beyond wishful thinking – for adding this gloss to the regulatory provision.

There is no basis for further review of the Court of Appeal's decision affirming judgment to BMA on Rask's ADA claim. The Court should deny the Petition.

III. THE EIGHTH CIRCUIT COURT'S DETERMINATION THAT RASK FAILED TO AVAIL HERSELF OF THE PROTECTIONS OF THE FMLA DOES NOT WARRANT SUPREME COURT REVIEW.

A. The Court of Appeals' Applied Well-Settled Law to the Facts of this Case in Holding that Rask Failed to Provide Notice of Her Need for Leave Due to a Serious Health Condition.

1. The Standard for Employee Notice is Well-Established.

To establish a claim of unlawful interference under the FMLA, an employee must establish the following five elements: she was eligible for the FMLA's protections, 29 U.S.C. § 2611(2); her employer was covered by the FMLA, 29 U.S.C. § 2611(4); she was entitled to leave under the FMLA,

29 U.S.C. 2612(a)(1); she provided sufficient notice of her intent to take leave, 29 U.S.C. § 2612(e)(1); and her employer denied her FMLA benefits to which she was entitled.

The statute does not specify what kind of notice an employee is required to give of her intent to take FMLA leave when the need for leave is unforeseeable, and the courts have declined to announce any categorical rules for the required content of the notice. (App. A, p. 21); *see also Willis v. Coca Cola Enters.*, 445 F.3d 413, 419 (5th Cir. 2006); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 763 (5th Cir. 1995). Of course, an employee may specifically reference the FMLA, thereby satisfying the notice requirement, but she is not required to do so. *Manuel v. Westlake*, 66 F.3d 758, 764 (5th Cir. 1995)

In the absence of an express request for FMLA leave, courts consistently hold that to provide sufficient notice under the FMLA, employees must impart sufficient information to the employer reasonably to apprise it of the employee's request to take time off due to a serious health condition. (App. A, p. 22) (citing *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999), *cert. denied*, 528 U.S. 1050 (1999)); *see also Greenwell v. State Farm Mutual Automobile Ins. Co.*, 486 F.3d 840, 842 (5th Cir. 2007); *Willis v. Coca Cola Enters.*, 445 F.3d 413, 419 (5th Cir. 2006). Failure to provide sufficient notice that the employee has a serious health condition and that leave is needed due to the condition is grounds for summary judgment.

2. The Court of Appeals Applied the Correct Standard for Employee Notice.

The Court of Appeals recognized that Rask was required to provide sufficient notice that she had a serious health condition and that she needed leave because of it. *See* App. B, p. 22 (citing *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990-91 (8th Cir. 2005) for the proposition that "[b]ecause a serious health condition is a prerequisite for FMLA leave, an employee must provide information to the employer 'to suggest that his health condition could be serious'" as opposed to "ordinary 'sick-days.'") This requirement, and the distinction between notifying an employer of a serious health condition and notifying employer of an ordinary sick day, is based squarely in the applicable case law and statutory and regulatory provisions.

Courts consistently hold that a complaint of sickness or a vague reference to a mental condition does not satisfy the notice requirement, even if the underlying condition may qualify as a serious health condition. *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1007 (7th Cir. 2001); *Willis*, 445 F.3d at 419 (affirming summary judgment to employer where employee complained of sickness but did not inform her supervisor that her sickness was due to complications in her pregnancy and, thus, did not clearly link her sickness to a serious health condition); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 302 (5th Cir. 1999) (holding that the employee's reference to his mental condition did not constitute the

requisite notice of an intent to invoke FMLA leave); *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980 (5th Cir. 1998) (holding that the "meager" information provided to the employer concerning the employee's alleged illness was insufficient FMLA notice).

3. The Court of Appeals Correctly Applied the Standard in Concluding that Rask Failed to Provide Sufficient FMLA Notice.

The Court of Appeals correctly held that, under established legal principles, Rask failed to give proper notice of her need to take leave under the FMLA because she failed to inform BMA that she had depression, that her depression was a serious health condition, and that she needed to take leave because of it. Rask chose not to reference or request FMLA leave during her employment. In fact, according to Rask, she chose not to do so because her "doctor preferred that [she] tried to stay working." (App. B, p. 39.) Additionally, Rask never advised her supervisors that her absences were in any way related to a condition of depression, even if she mentioned the word "depression" in a routine, non-medical conversation with her supervisor at some unidentified time during her employment, and she certainly never provided BMA enough information to determine that she had depression and that it constituted a serious health condition. *See Collins*, 272 F.3d at 1008 (affirming summary judgment to employer on plaintiff's FMLA claim because, in advising his employer that he was "sick," employee

did not specifically link his absence to depression or provide information sufficient to establish that his depression was a serious health condition, despite employee's contention that he had previously mentioned his depression to his supervisor).

Rask failed to give proper notice. As a result, BMA had no duty to inquire or provide Rask with FMLA leave.[6] BMA was not required to engage in pure speculation into the reasons Rask was not performing her job. *See Satterfield*, 135 F.3d at 980 (FMLA requires only a limited inquiry, and employers are not required to be clairvoyant). The Court of Appeals properly affirmed judgment on Rask's FMLA claim.

B. Rask Misunderstands the Court of Appeals' Decision.

Rask's assertion that the Court of Appeals has decided important questions of federal law rests on a confused reading of the decision. (Petition, p. 7.) The Court of Appeals did not, as Rask contends, apply a "surgical distinction" between Rask's alleged depression and the side effects she was experiencing from her medication. (Petition, p. 8.) Rather, Rask's failed to provide BMA with any notice that the side effects she claims to have been experiencing were in some way related to a serious health condition, and

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[6] As set forth above, notwithstanding Rask's failure to inform her supervisors about the specifics of her condition, her supervisors nonetheless made several inquiries to Rask about her health and whether there was anything BMA could do to help her when she was failing to perform up to expectations.

that failure stands as the basis for the Court of Appeals' decision. Without any evidence that Rask notified BMA of a causal connection between her medication side effects and her alleged depression, the Court of Appeals had no basis to treat the two as interrelated concepts within the notice analysis. Rask, not the Court, is responsible for the separation between Rask's alleged depression and her medication.

Rask reveals her confusion about the Court of Appeal's holding on her FMLA claim through her use of inapplicable hypothetical examples. (Petition, pp. 8-9.) Rask's three examples are wholly inapplicable to her case, as all of them assume critical facts relating to notice that are not present in this case. Namely, the examples assume (1) that the employer has knowledge that the employee has a serious health condition, and (2) that the employer has knowledge of the direct relationship between the condition, and the complications, side effects, or setbacks resulting from the serious health condition. (*Id.*) This, of course, is what distinguishes Rask's case from her illustrations and precludes the examples from being applied in any meaningful way to the Court of Appeals' decision.

CONCLUSION

For the reasons set forth herein, BMA respectfully requests that Rask's request for a writ of *certiorari* to review the decision of the Eighth Circuit Court of Appeals be denied in its entirety.

Dated: May 19, 2008

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IN THE

Supreme Court of the United States

ELIZABETH RASK,

Petitioner,

v.

FRESENIUS MEDICAL CARE NORTH AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

A. Respondent Argues Disputed Facts And Largely Avoids The Issues Raised In The Petition

As this case wound its way through the court system to its highest tribunal, one common engine drove respondent's arguments along the way: the notion that respondent's facts were the only facts, no matter what else the record had to offer. From the extraordinary (and irrelevant) effort to argue to this Court who the employer was (BMA v. Fresenius -- a long dead issue), to its continued denial of what petitioner's supervisors knew of her illness and medications, to its misrepresentation of what petitioner knew of its Family and Medical Leave Act (FMLA) policy and, finally, to its denial of what it told petitioner was the very reason why it fired her – respondent has consistently plunged ahead with presenting as "facts" matters that are disputed by the record evidence.

In its opposition brief, respondent cites to the District Court opinion on summary judgment as its source for some of these disputed facts. The disputed nature of these facts and the District Court's fact finding on summary judgment, however, was the essence of petitioner's initial appeal to the Eighth Circuit. Summary judgment in employment litigation reached a new plateau in this case, one unimagined by the Supreme Court when its trilogy of Rule 56 cases was decided in the mid 1980's. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Fed. R. Civ. Pro. 56. The District Court engaged in significant fact finding, resolving key disputes against petitioner to reach its ultimate conclusion.[1] The Court of

[1] For example, the District Court first noted the following testimony from petitioner in its opinion: "According to Rask, she explained why she left

Appeals avoided many of these landmines, but nonetheless read inferences from facts about what respondent knew of petitioner's illness and medication against petitioner and ignored an affidavit from petitioner. When this Court reads the opposition to certiorari filed by respondent, it needs to be aware that the "facts" recited therein were hotly disputed in the courts below.

Respondent's opposition brief simply drags the argument into the world of "he said/she said", something petitioner has contended all along belonged to the realm of a jury and not summary judgment. This petition, however, is about much more than simply a failure to follow Rule 56. It is about a precedent that threatens the family and medical leaves of workers who need time off because of the side effects of treatment and not simply because of the underlying serious health condition. It is also about whether time off from work to see a doctor in the Eighth Circuit is just as much a reasonable accommodation under the Americans with Disabilities Act as it is in other circuits, or whether such time off is not a reasonable accommodation because it "personally benefits" the employee in some way, as the Eighth Circuit erroneously reasoned. These are questions of no small

---

[on March 22] and Mitchell [a manager] said, 'this is the first time I've heard about any depression or anything.' (Pet. App. B at 37). The District Court then noted the contrary testimony of Pedersen and Mitchell, stating "Mitchell denied knowledge that Rask was suffering from depression[.]".. Id. The Court then held that "[d]espite the many conversations that Rask had with Pederson [Rask' supervisor] and Mitchell about her attendance and performance, Plaintiff did not mention that she was suffering from depression[.]"(Pet. App. B at 61)(emphasis added). In yet another place in its opinion, the District Court said, "Here, the record overwhelmingly reflects that Rask failed to notify Defendant of her depression[.]" (Pet. App. B at 60). The Court could only have reached this conclusion by accepting Pedersen and Mitchell's testimony and rejecting petitioner's, this on a mere paper record with no trial. The Supreme Court could never have intended such a use for Rule 56 when it decided the trilogy above.

importance to the average worker who could be healthy one day and in need of protected time off to see a doctor the next.

B. Respondent's Argument That The Court Held That Notice Of A Need For FMLA Leave Was Inadequate Because Petitioner Gave Respondent No Link Between The Medications And The Depression Is Factually Wrong, It Requires The Appellate Court To Have Ignored The Affidavit And Deposition Of Petitioner To The Contrary, And It Is An Invitation To Summary Reversal

Contrary to respondent's argument, the appellate court's holding on the sufficiency of the notice provided by petitioner of her need for FMLA leave depended *entirely* on whether the Court included notice of her medication's side effects in the equation. To suggest as respondent has that what the Court really meant to say was that the employer did not know that the medications were for the depression and so the two could not be linked for purposes of notice is not supported by the record.[2]

To reach respondent's conclusion, the Court would had to have ignored entirely petitioner's affidavit to the District Court in which she testified:

> "My depression was generally widely known at Fresenius and was well known to my supervisor Patty Pedersen. We discussed it on many occasions. We also discussed the medications I was taking and that they

---

[2] (Resp. Opp. Br at 24)("Without any evidence that Rask notified BMA of a causal connection between her medication side effects and her alleged depression, the Court of Appeals had no basis to treat the two as interrelated concepts within the notice analysis.")

> were for depression. I discussed with Ms. Pedersen how my depression affected my ability to concentrate, that I could not focus or think clearly and that I did not trust myself working with patients when the depression was at its most severe. When I worked at Eveleth there were numerous discussions at work with Ms. Pedersen present about my being on Prozac."

(Appellant's App. to Ct. of Appeals at 95-96)[3]

Petitioner also testified that she told her supervisor on May 28, 2004, just days before her termination: "I talked to Patty and I said, 'Patty, I'm having -- I talked to my doctor and they want me to come in tomorrow, I won't be able to work. I need help with my medication still, I'm still having a lot of side effects from what they put me on.'" (Appendix to Ct. of Appeals at 114 -- Rask depo. at 158).

The explanation of the Court's opinion offered by respondent therefore does not square with the record. To follow respondent's argument, the Court would have ignored the petitioner's record evidence and would have beyond any doubt violated Rule 56. The distinction respondent urges is an admission by respondent of error and is proper grounds for summary reversal by this Court. U.S. Sup. Ct. R.16.1.

Respondent complains that petitioner did not mention the FMLA (Resp. Opp. Br. at 22), nor did she get a doctor's note when she told them of her need to see the doctor (Resp.

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[3] (Cf. Resp. Opp. Br. at 4, fn.2, erroneously claiming that "Rask's assertion that she 'told her supervisor and her supervisor's manager of her depression and her requiring medication for its treatment' is simply not supported by the record.").

Opp. Br. at 5), but neither of these are required by the FMLA. 29 C.F.R. § 825.303(b) ("The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means.")

It was only when the Court of Appeals elected to parse the notice of depression from the notice of the effects of medication for the depression that the notice was held to be inadequate under the FMLA. That is where the Court erred and is where the decision threatens all who are treated for serious health conditions, suffer side effects from the treatment and need FMLA leave to see the doctor to fix the problem.

The issue becomes a jury question only because respondent disputes what petitioner told it. Unless summary judgment law has become so skewed that judges are now free to decide credibility on paper records, this case must be remanded to allow a jury to do what juries do best: decide who to believe.

C. Respondent's Argument That The Court Of Appeals Engaged In A "Fact Specific Analysis" on Petitioner's ADA Claim Requires That The Appellate Court Have Ignored Record Evidence From Petitioner And Would Allow For Summary Reversal By This Court

Respondent presents another argument for summary reversal when it attempts interpretation of the Court of Appeals' holding on the American's with Disabilities Act (ADA) claim. Respondent contends that the Court simply engaged in a "fact specific analysis" to come to the conclusion that there was no duty to reasonably accommodate petitioner's depression by providing her with time off to see

the doctor. (Resp. Opp. Br. at 16-17). If respondent were correct, this "fact specific analysis" would also have had to violate Rule 56 and would be an easy decision for the Supreme Court to summarily reverse.

The undisputed evidence shows that respondent failed to meet its duty to engage in an interactive process with petitioner to determine a reasonable accommodation. The Eighth Circuit has previously acknowledged that, "Under the ADA, an employer must engage in an interactive process to identify potential accommodations that could overcome the employee's limitations. *Burchett v. Target Corp.*, 340 F.3d 510, 517 (8th Cir. 2003. `[T]he failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.'" *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000) (citation omitted). For the Court of Appeals to have engaged in a "fact specific" analysis, it would had to have ignored the undisputed evidence that respondent failed to engage petitioner in the very fact finding process that the appellate court previously said was required.

The Court would also have had to ignore the following facts of record:

> 1. Respondent had policies allowing for time off, including personal leave time ("PTO"), extended sick leave ("ESL") and FMLA time off. (Appellant's App. to Ct. of Appeals at 139-41). At the time of her termination, petitioner still had 48.5 hours of unused PTO available to her. (Appellant's App. to Ct. of Appeals at

> 86). The policies and the fact that petitioner had time available to her under the policies are prima facie evidence of an ability to accommodate.
>
> 2. Respondent did not replace petitioner for ten months after her termination, indicating that her presence was not so urgently needed as respondent suggests. (Appellant's App. to Ct. of Appeals at 38).
>
> 3. Respondent was overstaffed at the time petitioner requested time off to see her doctor. Respondent admitted this to the Court of Appeals when it argued the following: "She [Rask] knew her unit was overstaffed around the time of her discharge, and admits that a further hours reduction was something BMA 'could have done'[.]" (Resp. Br. to Court of Apps. at 41-42)

In *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002), this Court found that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases. . . Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."

A request for time off to see a doctor to have medications adjusted when a company is overstaffed and an employee has 48.5 hours of PTO time available to her under the company's own policies "seems reasonable on its face".

Barnett, *supra*. Being overstaffed, if respondent was concerned about short notice absences, it could simply have offered an alternative block of time off for petitioner, consistent with its time off policies, to get her medications straightened out. The interactive process discussed earlier allows the employer the opportunity to select the accommodation that works best. By failing to even engage in the process, however, respondent violated the ADA.

What is clear from the record is that respondent at no time offered any actual proof of any undue hardship caused by petitioner's three days of absence to meet its burden of proof under the ADA. Respondent never offered proof of any employees who worked any extra hours or found their shifts more burdened. It offered no proof of any additional expense. It offered only conclusory speculation.

Respondent's claim that the Court of Appeals found as a factual matter that petitioner did not give adequate notice of her disability to respondent sufficient to trigger a duty to reasonably accommodate would again be a basis for error if true. (Resp. Opp. Br. at 11). Respondent bases this argument on the erroneous factual assertion that petitioner never "offer[ed] specific evidence of any conversation in which she advised her supervisors that she had depression that was causally related to her absences." Id. This claim ignores the deposition testimony and affidavit of petitioner recited above in which she testified about those very conversations. (Appellant's App. to Ct. of Appeals at 95-96 – Rask affidavit, and 114 -- Rask depo. at 158). It also ignores the following testimony from petitioner:

> "She [Pederson] knew about my medication management, I was having problems with my medication, I was having side effects from my

> medication, and she knew I was, I was having problems and I needed to get my medication adjusted and she knew I was seeing a doctor about it, I let her know that."

(Appellant's App. to Ct. of Appeals at 109).

> "And then the next time I worked, Chris and Patty had a meeting with me, because they wanted to know why I left that day. And I explained in there and Chris was like, 'Well, this is the first time I've heard about any depression or anything,' and that's because Patty hadn't said nothing to her I guess.
>
> But I just kind of asked and let them know that I'm having problems with my medication and, you know, would you stand by me, I might miss a day here and there because of it, but, you know, I've been here for almost six years with this company, can you stand by me now. And when I left out there, it seemed like yeah, they would, you know.
>
> But the next time I talked to Patty, I called her and I said, "I can't make it, the doctor told me I can't go to work, I need to come in and have my medication redone[.]"

Id. Petitioner was fired a few days later. Id.

The above is beyond doubt a "real world" request for the accommodation of time off to see a doctor to get medications redone. The law imposed no requirement that she put the request in writing as respondent urges, nor was there any elegant form the law required her request to take.

The real issue on certiorari review of the ADA claim is the view by the Eighth Circuit that time off from work is not a reasonable accommodation because it benefits the employee personally. Respondent has no answer for this issue, other than to suggest that the Court must have engaged in fact finding and was not setting a "bright line rule". (Resp. Opp. Br. at 16-19).

If the Court of Appeals truly engaged in a "fact specific analysis" as respondent urges, it would had to have ignored petitioner's record and have viewed respondent's facts in a vacuum devoid of all context. It would had to have made assumptions and drawn inferences unfavorable to petitioner, all of which would be a clear violation of Rule 56 and grounds for summary reversal by this Court.

Respondent's effort to distinguish cases from the other circuits in conflict with this decision is a meaningless effort that completely misses the point. The importance of those cases in comparison to the instant case is that the cited cases recognized that time off can be a reasonable accommodation under the ADA, whereas the instant case holds time off to be a matter that benefits the employee personally and is therefore an unreasonable accommodation.[4]

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[4] Respondent's claim that *Walton v. Mental Health Ass'n. of Southeastern Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999) relied on the same federal ADA regulation as the one at issue in the petition is erroneous and deceptive. *Walton* was not interpreting the regulation respondent quotes it as interpreting. Respondent quotes the text of the regulation that is at issue here (29 C.F.R. Part 1630, App. at §1630.9) but then it incorrectly

It is this latter holding that puts employees in the Eighth Circuit who need time off to see a doctor at an unfair risk of termination of employment, in comparison to the other circuits.

II.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that the Supreme Court grant her request for a writ of certiorari. In the alternative, petitioner respectfully requests that the Supreme Court summarily reverse the decision of the Eighth Circuit as clearly violating Rule 56 and remand the matter for trial.

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cites it as 29 C.F.R.§§ 1630.2(o)(ii)(iii), which is a completely different regulation. (Resp. Opp. Br. at 14-15). While *Walton* concerned itself with §1630.2(o)(ii)(iii), the regulation relied on by the Eighth Circuit that is at issue here is 29 C.F.R. Part 1630, App. at §1630.9. *See Rask*, 509 F.3d at 470-71 (Pet. App. A at 19-20) *Walton* was not interpreting the same regulation that is at issue in this p. tition, and to claim that it was is a very misleading error. Note that petitioner had included the text of both regulations in her appendix to the petition. (Cf. Pet. App. D at 68-70 and 73-76).

Respectfully Submitted,

Dated: May 27, 2008.

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